89-580

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

KENNETH ABRAMS, LAWRENCE J. ALEXANDER, INGEBORG CHABAN, and JAMES F. FLAGLE,

Petitioners,

v.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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October, 1989

QUESTIONS PRESENTED

I. Is preliminary injunctive relief available to nonunion employees under National Labor Relations Act § 8(a)(3) to enforce the requirements of a union's duty of fair representation in the "exaction" and "collection" of agency fees, as established in *Communications Workers v. Beck*, 108 S. Ct. 2641 (1988)?

II. Is such preliminary injunctive relief properly denied under color of *Machinists v. Street*, 367 U.S. 740 (1961), even though the nonunion employees establish facts in connection with the union's "exaction" and "collection" of agency fees that the District Court itself concedes are "egregious"?

III. Is such preliminary injunctive relief against an "egregious" "exaction" and "collection" of agency fees properly denied under color of the Norris-LaGuardia Act?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs below (petitioners here) are Kenneth Abrams, Lawrence J. Alexander, Ingeborg Chaban, and James F. Flagle. They are named in the Class Action Complaint for Declaratory and Injunctive Relief, and they are named individually in the Notice of Appeal from the District Court's denial of preliminary injunctive relief which is the subject of the instant petition.

Defendant below (respondents here) is the Communications Workers of America, a labor organization which is plaintiffs' "exclusive representative" under § 9(a) of the National Labor Relations Act.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, Kenneth Abrams, Lawrence J. Alexander, Ingeborg Chaban and James F. Flagle respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the judgment entered July 13, 1989. As grounds therefore they state:

OPINIONS BELOW

The Memorandum Opinion of the District Court denying preliminary injunctive relief is reported as *Abrams v. Communications Workers*, 702 F. Supp. 920 (1988), and is reprinted in the Appendix at 3a. The Memorandum

Opinion and Order denying reconsideration and an injunction pending appeal is reported at 702 F. Supp. at 925 (1988), and is reprinted in the Appendix at 13a.

The judgment, *per curiam* and without opinion, of the United States Court of Appeals for the District of Columbia Circuit is unreported; it is reprinted in the Appendix at 1a.

JURISDICTION

Jurisdiction of the United States District Court for the District of Columbia is invoked pursuant to 28 U.S.C. §§ 1331 and 1337. The decision of that court denying preliminary injunctive relief is dated October 25, 1988, and the subsequent motion for reconsideration and for an injunction pending appeal was denied on November 7, 1988.

A notice of appeal to the United States Court of Appeals for the District of Columbia Circuit was filed on November 10, 1988, within the time prescribed by F.R.A.P. Rule 4. That court's judgment, affirming the District Court, was filed on July 13, 1989.

The instant petition for certiorari is being filed on October 11, 1989, within the time prescribed by this Court's Rule 20.2 and 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

The First Amendment: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

Statutory Provisions:

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3): "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . ."

Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d): "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ."

Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a): "Representatives designated or selected

for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."

STATEMENT OF THE CASE

Petitioners are employed either by Bell Telephone Laboratories or the Chesapeake and Potomac Telephone Company (herein "employers"). Respondent Communications Workers of America (CWA)[1] is a labor organization which has collective bargaining agreements with the employers. Petitioners are employees, the employers are employers, and CWA is a labor organization under the National Labor Relations Act (NLRA).[2]
CWA is petitioners' exclusive representative[3] for purposes of collective bargaining.[4] Petitioners are *not* members of CWA.

Since 1974, the bargaining agreements between CWA and the employers have contained compulsory unionism provisions which, on their face and as applied, have required and still require petitioners to pay CWA, as a

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[1] CWA was the unsuccessful petitioner in *Communications Workers v. Beck*, 108 S. Ct. 2641 (1988).

[2] 29 U.S.C §§ 152(3),(2), and (5), respectively.

[3] 29 U.S.C. § 159(a).

[4] 29 U.S.C. § 158(d).

condition of their employment, amounts equivalent to the full dues CWA charges its voluntary members.[5]

Anticipating this Court's *Beck* decision, petitioners filed the instant suit on October 19, 1987. The complaint, ¶ 4, alleges a class of similarly situated nonmembers subject to the dues-equivalent obligations of CWA agreements with NLRA employers.[6] Because CWA was continuing to enforce the dues-equivalent obligations after *Beck*, petitioners moved for a preliminary injunction on September 29, 1988. At the hearing thereon, petitioners introduced the affidavits of Kenneth Abrams (App. at 27a) and Barbara Yezek (App. at 54a), as well as those of McConnell and Serio referred to above.

The affidavits of employees Abrams, McConnell and Serio recount their efforts to obtain reductions in their fees to CWA's costs of collective bargaining by direct application to CWA. Those efforts were frustrated by CWA over protracted periods of time.[7]

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[5] CWA and the employers, with insignificant exceptions we will discuss below, enforce those provisions as written. This is true even after this Court's *Beck* decision. Indeed, the dues-equivalent requirements of those agreements were not changed in light of *Beck* in the 1989 renegotiations of those agreements.

[6] Certification of the class described in ¶ 4 has been denied. Petitioners have moved for certification of sub-classes on bases suggested in the District Court's decision. If for some unforeseen reason certification of sub-classes were also denied, the complaint would be amended to add substantial numbers of named plaintiffs, including John McConnell and Charles Serio, whose affidavits appear in the Appendix ("App.") at 32a and 41a, respectively.

[7] Because those affidavits were not challenged by CWA, we did not introduce the many affidavits available from other employees who had, to the same end, endured the same frustration.

The affidavit of paralegal Barbara Yezek is based upon her study of the transcript in *United States v. Hughes*, Criminal Action No. CR 86-98 (N.D. Ohio sentencing Nov. 13, 1987). Verbatim excerpts from the testimony in that case are annexed to Yezek's affidavit. They show the systematic procedures Hughes, a CWA District Vice President, employed to falsify expense vouchers so that direct contributions could be made from general funds, which include dues-equivalent exactions from plaintiffs and other similarly situated employees, to candidates for political office. Those procedures, the affidavit and the excerpts of testimony show, were not limited to Hughes and other of his CWA District 4 staff employees, but were, in fact, employed by one-half of CWA's fourteen Districts (App. at 55a).

The District Court concluded that those facts are "egregious" (App. at 17a), but denied preliminary injunctive relief (App. at 13a) for reasons discussed in more detail below. The denial of injunctive relief was not modified on reconsideration.[8] An appeal was taken to the United States Court of Appeals for the District of Columbia Circuit; that court affirmed *per curiam*, and without opinion (App. at 1a).[9]

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[8] Petitioners' motion for an injunction pending appeal and for reconsideration was denied by a Memorandum Opinion and Order of November 7, 1988 (App. at 13a).

[9] Petitioners' motion for an injunction pending appeal addressed to the Court of Appeals was also denied, *per curiam*, and without opinion. (App. at 1a.)

REASONS FOR GRANTING THE WRIT REQUESTED

I. Importance of the Case

This case raises stark questions concerning the remedies available to employees subject to compulsory unionism provisions entered into and enforced under NLRA § 8(a)(3). The answers to those questions are of considerable importance to employees, unions, and employers concerned with the validity and enforceability of the statutory scheme as this Court has interpreted it. For even now, more than one year after its landmark defeat in *Beck*, and after the completion of negotiations for new collective-bargaining agreements entered into in knowing violation of *Beck*, CWA defiantly continues to maintain in those agreements provisions which, on their face, require nonmembers such as petitioners to pay full dues-equivalent amounts as a condition of employment. Those provisions cavalierly disregard and disdain this Court's plain holding in *Beck* that NLRA § 8(a)(3) does *not* permit "collection" and "exaction" of fees from nonmembers in excess of CWA's demonstrated collective bargaining costs.

Of the approximately 626,000 employees CWA represents under the NLRA, at least 65,000 are nonmembers in states where the protections of a Right to Work law do not apply. Thus, without preliminary injunctive relief against CWA being afforded in this case, more than 10% of these employees will continue to be misled by the dues-equivalent provisions CWA maintains in its collective-bargaining agreements, and coerced into submission to those blatantly illegal provisions by the requirements thereof that dues-equivalent payments are an inflexible condition of employment.

The situation is fundamentally the same for employees subject to other unions under the NLRA. Precise nation-

wide figures for nonmembers are difficult to obtain. CWA itself has indicated that some 6,000,000 employees are covered by "union security" provisions in states with no Right to Work law.[10] If the same ratio of members to nonmembers at CWA holds for other unions under the NLRA, more than 600,000 nonmembers depend, as a practical matter, upon the outcome of this case for enforcement of their *Beck* rights. For, if employees asserting *Beck* rights are universally denied injunctive relief on the specious grounds the District Court advanced, and in the teeth of the record of "egregious" facts presented here, *Beck* will effectively be rendered null and void.

II. The Result Below is Contrary to *Beck*

Excessive "Exactions" And "Collections" Prohibited

The repeated and emphatic language of *Beck* conveys, with crystal clarity, the mandate of NLRA § 8(a)(3) in cases of this kind.

> • [P]etitioners [*i.e.*, CWA] contend that § 8(a)(3) cannot plausibly be read to prohibit the collection of fees in excess of those necessary to cover the costs of collective bargaining.
>
> We find this argument unpersuasive for several reasons.[11]
>
> • [CWA] also rel[ies] on certain aspects of the Taft-Hartley Act's legislative history as evidence that Congress intended to permit the collection and use of full union dues, including those allocable to activities other than collective bargaining. Again, however, we find this history insufficient

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[10] CWA's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, submitted in *Communications Workers v. Beck*, No. 86-637 (U.S., 1986), at 6.

[11] 108 S. Ct. at 2653.

to compel a broader construction of § 8(a)(3) than that accorded § 2, Eleventh . . . .[12]

• [CWA] would have us infer from the demise of this "bill of rights" that Congress "'rejected . . . general federal restrictions on either the dues equivalents that employees may be required to pay or the uses to which unions may put such dues-equivalents,'" and that aside from the prohibition on political expenditures Congress placed no limitations on union exactions other than the requirement that they be equal to uniform dues. . . . We believe [CWA's] reliance on this legislative compromise is misplaced.[13]

• It simply does not follow from this that Congress left unions free to exact dues equivalents from nonmembers in any amount they please, no matter how unrelated those fees may be to collective bargaining activities. On the contrary, the complete lack of congressional concern for the rights of nonmembers in the debate surrounding the House "bill of rights" is perfectly consistent with the view that Congress understood § 8(a)(3) to afford nonmembers adequate protection by authorizing the collection of only those fees necessary to finance collective bargaining activities: because the amount of such fees would be fixed by their underlying purpose . . . .[14]

• [Y]et neither in *Street* nor in any of the cases that followed it have we deemed Congress' failure in § 2, Eleventh to prohibit or otherwise regulate such expenditures as an endorsement of fee collections unrelated to collective bargaining expenses. We see no reason to give greater weight to Congress' silence in the NLRA than we did in the RLA, particularly where such silence is again perfectly consistent with the rationale underlying § 8(a)(3): prohibiting the collection of fees that are not germane to representational activities would have been redundant if Congress understood § 8(a)(3) simply to enable unions to charge

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[12] *Id.* at 2654.

[13] *Id.* at 2655.

[14] *Id.*

nonmembers only for those activities that actually benefit them.[15]

• In any event, as noted above, Senator Taft later described § 2, Eleventh as "almost the exact provisions . . . of the Taft-Hartley law" . . . and we have construed the latter statute as permitting the exaction of only those dues related to representational activities.[16]

• We conclude that § 8(a)(3), like its statutory equivalent, § 2, Eleventh of the RLA, authorizes the exaction of only those fees and dues necessary to "performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues."[17]

The foregoing language clearly evidences this Court's intent that injunctive relief be available to prevent CWA's perversion of § 8(a)(3) into a device to extort monies from nonunion employees for nonstatutory purposes.

III. The Result Below is Contrary to *Abood*, *Ellis*, and *Elrod*

The District Court concluded that CWA's "exactions" and "collections" under § 8(a)(3) for nonbargaining purposes cause no irreparable harm to petitioners. *Abood*, *Ellis*, and *Elrod* belie this notion.

Abood

Abood v. Detroit Board of Education, 431 U.S. 209 (1977), addresses the constitutionality of "union security" provisions in public-sector collective bargaining agreements by reference to *Machinists v. Street*, 367 U.S. 740 (1961), a

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[15] *Id.* at 2656.

[16] *Id.*

[17] *Id.* at 2657.

private-sector case under the Railway Labor Act.[18] Indeed, the constitutional determination in *Abood* rests upon the conclusion that the First-Amendment rights of employees in both sectors of employment are, on this issue, identical:

> • The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights.[19]
>
> • The only remaining constitutional inquiry . . . is whether a public employee has a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation. We think he does not.[20]
>
> • The very real differences between exclusive-agent collective bargaining in the public and private sectors are not such as to work any greater infringement upon the First Amendment interests of public employees.[21]

Ellis

Ellis v. BRAC, 466 U.S. 435 (1984), addressed employees' remedies under the Railway Labor Act for unions' violations of *Street*. *Street*, also a case under the RLA, of course, arose in a Right to Work state. And, in part, this Court's analysis of the constitutional and statutory issues presented was based upon the Railway Labor Act's dis-

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[18] 45 U.S.C. § 151, *et seq.*

[19] 431 U.S. at 232.

[20] *Id.* at 229.

[21] *Id.* at 230.

placement of the Right to Work law.[22] *Ellis* arose in California, a state which does not have a Right to Work law. Significant to the development of the law concerning the rights of employees who are not members of the union which is their statutory representative, *Ellis* and *Street* reach the same fundamental result. Thus, whether a state law is displaced has no bearing upon the application of constitutional principles to the proper analysis of employees' rights with respect to the compulsory unionism provisions negotiated by their unions.

Beck also relies upon *Street* for its interpretation of the NLRA; indeed, this Court terms *Street* "controlling" in so far as the existence of a valid claim for relief is concerned.[23] *Abood* and *Ellis*, in their language and by reliance upon *Street*, mean that constitutional constraints apply to *Beck*-type cases such as the instant case.

Elrod

Elrod v. Burns, 427 U.S. 347, 373 (1976), concluded that, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Throughout this litigation CWA has admitted that its "exactions" and "collections" from petitioners include monies allocable to lobbying activities.[24]

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[22] The RLA contains no provision comparable to the NLRA's § 14(b), 29 U.S.C. § 154(b), authorizing state Right to Work laws, which otherwise would be preempted.

[23] 108 S. Ct. at 2648.

[24] Through decisions of this Court, the determination of the proper collective bargaining charge has evolved from the identification and proof of nonbargaining activities and their exclusion from the charge, to requiring identification and proof of bargaining activities which are to be included in the charge. *Compare Ellis*, 466 U.S. at 448-55, with *Chicago Teachers v. Hudson*, 475 U.S. 292, 306-07 (1986) ("Instead of identifying the expenditures for collective bargaining and

Therefore, the decisions below that there is no irreparable harm to petitioners (App. at 11a), and that petitioners' constitutional rights provide no relief from CWA's "exactions" and "collections" for noncollective-bargaining purposes (App. at 13a-14a), are plainly wrong under *Abood*, *Ellis*, and *Elrod*.

IV. The Result Below is Contrary to *Boys Markets, Inc.* and *Jacksonville Bulk Terminals*

Relying upon the discussion of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, in *Street* and *Allen*,[25] and both ignoring the affidavits presented and the noncollective-bargaining uses to which CWA diverts petitioners' agency fees, the District Court concluded that "an injunction to prohibit the collection of any fees [is] improper." (App. at 12a.) Presumably, by this the court meant "improper" *no matter what facts the employees establish at the hearing on preliminary injunction*. Subsequently, on reconsideration, the court reached the quite different conclusion that "the Norris-LaGuardia Act does not forbid appropriate injunctive relief . . . but merely calls for greater scrutiny and special safeguards in applying the remedy." (App. at 16a.) But, again ignoring the affidavits presented and the illegal uses to which CWA applies petitioners' monies, the court denied the injunction. Presumably, the

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contract administration that had been provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee—the Union identified the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers. An acknowledgement that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%.") However, since *Street*, lobbying by private sector unions has not been chargeable to nonmembers under either approach. *Street*, 367 U.S. at 764.

[25] *BRAC v. Allen*, 373 U.S. 113 (1963).

court meant that an injunction would be proper on some showing, but that the affidavits petitioners presented were deficient in ways the court failed to specify.

The court improperly refers to the facts presented by affidavit as "allege[d]" rather than sworn to (App. at 17a), but, even so, the court finds those facts "egregious". (*Id.*) With no explanation of why admittedly "egregious" facts do not warrant an injunction, even under Norris-LaGuardia, the court again denied injunctive relief. Apparently the court concluded that the anti-injunction "policy" of the latter Act both outweighs petitioners' constitutional rights and their statutory rights under the NLRA. But the court identifies not a single factor supporting this conclusion.

Of course "balancing" of the kind the court engaged in is not the proper fulfillment of the judicial role in such cases. "Egregious" facts cannot legitimately be "balanced" out of existence. For, under this Court's precedents, injunctive relief is properly awarded for violations of the provisions of labor statutes, such as the NLRA. The "egregious" facts established here by affidavit show plain violations of *Beck* and the NLRA. The Norris-LaGuardia Act, then, is no bar to injunctive relief, for "the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy [of another labor statute] . . . ." *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 253 (1970).[26] The NLRA's important policy is undermined by the practices of CWA shown, and injunctive relief is therefore proper.

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[26] *Accord, Virginia Ry. v. System Federation No. 40*, 300 U.S. 515, 563 (1937); *Jacksonville Bulk Terminals v. International Longshoremen's Ass'n*, 457 U.S. 702, 717 n.17 (1982); and *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 107 S. Ct. 1841, 1850 (1987).

Thus, the two decisions of the District Court conflict with each other as to whether the Norris-LaGuardia "policy" precludes injunctive relief altogether, or only if certain evidentiary standards are not met. This confusion is not addressed or resolved by the *per curiam* decision, without opinion, of the Court of Appeals. And the issue obviously remains of singular importance to the judicial administration of cases in which nonunion employees seek to protect their rights under *Beck*.

V. The Result Below is Contrary to *Steele* and *Graham*

Beck rests squarely upon the duty of fair representation. In essence *Beck* held that a union which is an NLRA § 9(a) exclusive representative violates its duty of fair representation when it exacts and collects from nonunion employees agency fees in excess of its demonstrated costs of collective bargaining.

Since the seminal decision in *Steele*,[27] injunctive relief has been available to prevent violations of the duty of fair representation. As the Court there said, "[t]he representative which thus discriminates may be enjoined from so doing . . . ." [28] And *Graham* reaffirmed *Steele* in this regard, emphasizing that the Norris-LaGuardia Act does not bar injunctive relief: "If . . . there remains any illusion that under the Norris-LaGuardia Act the federal courts are powerless to enforce these rights, we dispel it now. The District Court has jurisdiction to enforce by

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[27] *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192 (1944).

[28] *Id.* at 203.

injunction petitioners' rights to nondiscriminatory representation by their statutory representative."[29]

The District Court back-handedly acknowledged these controlling precedents, but concluded that "special circumstances" (App. at 16a), such as the racial discrimination involved in *Steele* and *Graham*, must be present before an injunction can issue. In as much as the District Court explicitly noted the "egregious facts plaintiffs allege with respect to CWA's accounting and administrative practices",[30] there are special circumstances here which warrant the injunction sought, even on the District Court's (mis)statement of the rule. Of course, the duty of fair representation is *not* confined to the "special circumstance" of racial discrimination, but bars *any* breach by an exclusive representative of its duties under the statute by which it attains authority as nonunion employees' § 9(a) exclusive representative.[31]

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[29] *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232, 240 (1949).

[30] App. at 17a. As documented above, those "egregious" facts were not only alleged, but are established by the affidavits submitted.

[31] The duty of fair representation is "highly fiduciary." *National Maritime Union v. Herzog*, 78 F. Supp. 146, 172 (D.D.C. 1948). It is "jealously guarded" by the judiciary. *Augspurger v. Brotherhood of Locomotive Engineers*, 510 F.2d 853, 857 (8th Cir. 1975). And it applies to all aspects of the negotiation and enforcement of collective bargaining agreements. *Hester v. Operating Engineers*, 830 F.2d 172, 175 (11th Cir. 1987).

VI. Irreparable Harm

At various points, the District Court described the only harm here as "plaintiffs' loss of the use of their money . . . ." (App. at 17a.) The District Court, we believe, is mistaken in this conclusion, for reasons set forth more completely below. In summary, however, we restate the point here: this Court has held that the "exaction" and "collection" of employees' monies in excess of amounts authorized by statute is a *per se* violation of the duty of fair representation. And it is that violation for which, on the facts of this case, a preliminary injunction should have issued.

The fact is that, pursuant to § 8(a)(3), CWA makes payment of dues-equivalent amounts a *condition of employment*. Under the statute, and with no showing to a judicial officer whatsoever, CWA has, in all respects, a wage garnishment for its claims. It simply says to the employees, you pay the amounts we demand, or, if you do not, we are going to demand that your employer discharge you from employment.[32] Under color of § 8(a)(3), CWA condemns employees to whatever relief it deigns to provide or to perpetual litigation, as noted above. In this regard, too, the employees are subject to irreparable harm, for:

> An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of

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[32] This is no idle threat. CWA did just that in the case of *Fitz v. CWA*, 132 L.R.R.M. 2168 (D.D.C. Aug. 17, 1989). (This case is on appeal from the District Court's denial of all relief because of its interpretation of this Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983)). It also has done so in *Peck v. CWA*, No. 3-CB-5493 (NLRB filed July 31, 1988) (Mr. Peck's charges are pending.) And, of course, CWA implicitly threatens all employees subject to its dues-equivalent agency shop agreements with discharge for their failure to acquiesce in the payments demanded.

justice and its prompt administration as a remedy in equity by injunction.[33]

In this case, where precollection and preexaction procedures do not prevent excessive exactions and collections, and perpetual litigation is required to perfect rights, the preliminary injunction sought here is in keeping with established equity principles concerning irreparable harm, and should have been granted, in keeping with *Steele* and *Graham*.[34]

VII. The Result Below is Contrary to *United States v. City of San Francisco*

Injunctive relief should also have been granted to the petitioners on grounds that this Court's *Beck* decision is definitive. Section 8(a)(3) must be read just as if the section were rewritten in accord with this Court's interpretation.[35] Thus, CWA cannot rely upon its own interpretation of that section, an interpretation at odds with *Beck*, and one claiming that it can continue to make dues-equivalent exactions from nonmembers, just as though *Beck* were not a decided case. Section 8(a)(3) is, for all purposes in law, what this Court said it is in *Beck*. Under *City of San Francisco*,[36] the statute, so interpreted, can be enforced by injunction. For, "this case does not call for a

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[33] *Local Union 499, IBEW v. Iowa Power & Light Co.*, 224 F. Supp. 731, 738 (S.D. Iowa 1964).

[34] This practice, under color of—or rather illicit use of—law raises serious and substantial questions under this Court's Fifth Amendment due process cases, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and *Fuentes v. Shevin*, 407 U.S. 67 (1972).

[35] *Shearson/American Express v. McMahon*, 482 U.S. 220, 268 (Stevens, J. concurring) (1987).

[36] *United States v. City of San Francisco*, 310 U.S. 16 (1940).

balancing of equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued."[37] This is so because, "[t]he equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective."[38] The Congressional policy to be enforced in this case is the one most recently and repeatedly confirmed in *Beck*.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision of that court which, *per curiam*, and without opinion, affirmed the District Court's conclusion that despite the precedents of this Court, and the evidence presented, a preliminary injunction should not issue to enforce this Court's decision in *Beck*.

Respectfully submitted,

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Dated: October 11, 1989

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[37] *Id.* at 30.

[38] *Id.* at 31.

APPENDICES

APPENDIX A

NOT TO BE PUBLISHED - SEE LOCAL RULE 14

United States Court of Appeals
For the District of Columbia Circuit
FILED JUL 13 1989
CONSTANCE L. DUPRE
CLERK

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7234 **September Term, 1988**

C.A. No. 87-02816

Kenneth Abrams, et al.,

Appellants

v.

Communications Workers of America,
An Unincorporated Labor Organization

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: Mikva, Edwards and Ruth B. Ginsburg, Circuit Judges

JUDGMENT

This case was considered on the record on appeal from the United States District Court for the District of

Columbia and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 14(c). It is

ORDERED AND ADJUDGED that the district court's orders, filed October 25, 1988 and November 7, 1988, be affirmed for the reasons stated in the memoranda accompanying those orders.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX B

Kenneth ABRAMS, et al., Plaintiffs,

v.

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), Defendant.

Civ. A. No. 87-2816 (RCL).

United States District Court,
District of Columbia.

Oct. 25, 1988.

On Motion to Reconsider or for
Injunction Pending Appeal
Nov. 7, 1988.

MEMORANDUM OPINION

LAMBERTH, District Judge.

Plaintiffs in this action have filed a complaint on behalf of themselves and putative class members alleging that defendant has violated the first amendment, the National Labor Relations Act (NLRA) § 8(a)(3) and the duty of fair representation owed by the defendant to plaintiffs. Plaintiffs are employees of private telephone companies who work in collective bargaining units represented by Communications Workers of America (CWA) and pay agency fees to CWA pursuant to collectively bargained union security provisions.

Plaintiffs maintain that the current collection of agency fees is in excess of the amount of such fees which the union spends on collective bargaining activities and thus violates the first amendment, the NLRA, and the duty of

fair representation. Defendant acknowledges the collection of fees in excess of those needed to support collective bargaining activity, but maintains that because the excess is not spent on non-collective bargaining activity, but rather held in an interest-bearing escrow account to be later refunded to plaintiffs, defendant is not in violation of any duty to plaintiffs. Defendant further maintains that no state action is involved such as to make defendant subject to the first amendment.

Defendant has filed a motion to dismiss, and plaintiffs have filed a motion for a preliminary injunction. The Court addresses each of these motions in turn.

I. Defendant's Motion to Dismiss

A. First Amendment Claim

Plaintiffs' complaint, the facts of which are taken as true for purposes of this motion, alleges that the agency fees collected by defendant are spent on political and ideological activities not authorized by plaintiffs, in violation of plaintiffs' first amendment rights. Defendant argues that, insofar as plaintiffs' complaint states a first amendment claim, that complaint fails for want of state action.

This issue was recently before the Supreme Court in *Communications Workers of America v. Beck*, __ U.S. __, 108 S.Ct. 2641, 101 L.Ed.2d 634(1988). In that case, the court found that the exaction of agency fees from dissenting employees in excess of the amount spent for collective bargaining activities violated § 8(a)(3) of the NLRA, but declined to reach the first amendment question. In light of the Supreme Court's failure to settle the issue, this court agrees with defendant that the holding of the D.C. Circuit in *Kolinske v. Lubbers*, 712 F.2d 471 (D.C.Cir.1983) controls, and has not, as plaintiffs suggest, been overruled *sub silentio* or successfully distinguished on its facts.

In *Kolinske*, the Court of Appeals addressed the issue of whether the defendant union violated the constitutional rights of the nonmember employee plaintiff when it refused to pay him strike benefits. Plaintiff had refused to participate in any strike activities except to honor the picket line. The strike benefits were paid from fees collected under an agency shop clause similar to the one at issue in this action. The Court of Appeals addressed at length the issue of whether or not the agency shop clause negotiated between a private union and a private employer pursuant to the NLRA constituted state action. This discussion encompassed all but one of the line of cases relied upon by plaintiffs, beginning with *Railway Employes' Department v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956) and ending with *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977).

This line, which also includes *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) and *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963), all involve the interpretation of and limit on union security provisions under the Railway Labor Act (RLA). In *Hanson*, according to the *Kolinske* court, the preemption by the RLA of a state law outlawing union shop laws constituted state action. The Court found that in preempting the state law the government created a right or privilege on the part of the union the exercise of which deprived the nonmembers of his constitutional rights. *Kolinske*, 712 F.2d at 476. In *Street* and *Allen*, the Court avoided the plaintiffs' constitutional claims by interpreting Section 2(11) of the RLA to prohibit the use of fees collected from dissenting employees under union security agreements for non-collective bargaining purposes. The *Kolinske* court found that unlike the RLA, the NLRA expressly preserves the power of the states to outlaw union

security laws. Therefore, the Court concluded, the preemption theory of state action discussed in *Hanson* was inapplicable to cases arising under the NLRA.

More troubling to the *Kolinske* court, and to plaintiffs in the present action, is the Supreme Court's expansive dicta in *Abood*, in which the court stated that "differences between public- and private-sector bargaining simply do not translate into differences in First Amendment rights." 431 U.S. at 232, 97 S.Ct. at 1798, *quoted* in *Kolinske* at 476. The appellees in *Kolinske*, like plaintiffs here, urged the court "to adopt the full sweep of that dictum from *Abood* and apply the first amendment full force. . . ." 712 F.2d at 476. The *Kolinske* court declined to do so, for reasons which remain persuasive today.[1]

Plaintiffs argue that *Kolinske* has been overruled by the Supreme Court *sub silentio* in *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). In *Ellis*, another RLA case, the court applied constitutional restraints to the collection and expenditure of agency fees, despite the fact that they were collected from employees in California, which does not have a right to work law. Because California does not have a state law to preempt, plaintiffs argue, the rationale which supported state action in *Hanson*, and upon which the *Kolinske* court relied, is no longer tenable.

This court does not read *Ellis* so broadly. As the Supreme Court most recently pointed out in *Beck*:

---

[1] The *Kolinske* court distinguished *Abood* for several reasons, noting that the *Abood* court did not face the issue of state action, and that the *Abood* court itself pointed out that *Hanson* and *Street* were RLA cases, and that no similar preemption provision existed under the NLRA. *Id.*

> [W]e ruled in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 [76 S.Ct. 714, 100 L.Ed. 1112] (1956), that because the RLA pre-empts all state laws banning union security agreements, the negotiation and enforcement of such provisions in railroad industry contracts involves "governmental action" and is therefore subject to constitutional limitations.

__ U.S. at __, 108 S.Ct. at 2656. The NLRA, the Court notes, differs from the RLA in this respect "for § 14(b) of the NLRA expressly preserves the authority of states to outlaw union security agreements." *Id.* The distinction thus appears to lie more in the statutory language itself, rather than, as plaintiffs suggest, whether or not a state actually has a statute which the RLA preempts.

Defendant cites two other cases, cited in both *Kolinske* and *Beck*, which support defendant's reading of *Kolinske* and the proposition that actions of private unions covered by the NLRA are not state action. In *Steelworkers v. Sadlowski*, 457 U.S. 102, 121 n. 16, 102 S.Ct. 2339, 2350 n. 16, 72 L.Ed.2d 707 (1982), the court noted that a union's decision to adopt an "outsider rule"—prohibiting contributions from nonmembers to candidates for union office—did not involve state action. Similarly, in *Steelworkers v. Weber*, 443 U.S. 193, 200, 99 S.Ct. 2721, 2725, 61 L.Ed.2d 480 (1979) the court found an affirmative action plan adopted into a collective-bargaining agreement was not subject to constitutional scrutiny. Although neither of these cases involved § 8(a)(3), they support the contention that union rules governed by the NLRA do not involve state action. *Beck*, __ U.S. at __, 108 S.Ct. at 2656; *Kolinske*, 712 F.2d at 476-77.

Lastly, plaintiffs attempt to distinguish *Kolinske* on its facts, adopting the distinction made by Judge Murnaghan in the concurrence in *Beck v. C.W.A.*, 800 F.2d 1280 (4th Cir.1986). Whereas the union's decision not to distribute

strike benefits to Kolinske could be "characterized as an internal union matter because the authority to make and enforce that decision lay solely with the union", the collection of agency fees is enforceable only by threat of action from the employer and stems from an agency contract that exists only by virtue of federal law. *Id.* at 1287 n. 8 (Murnaghan J. concurring); *Beck v. C.W.A.*, 776 F.2d 1187, 1205 (4th Cir.1985).

Even accepting this distinction as meritorious, it does not serve in itself to make actions under § 8(a)(3) constitute state action for two reasons. First, the argument fails to distinguish *Weber, supra*, in which an employer was intimately involved in enforcing the terms of the affirmative action plan incorporated into the collective-bargaining agreement. Like agency shop clauses under the NLRA, federal law merely authorizes such agreements, but does not mandate them, and thus no state action is involved. Second, because *Kolinske* and *Beck* both involve § 8(a)(3) issues, drawing a distinction between them does not advance the idea that all actions under § 8(a)(3) involve state action, as appears to be the case under the RLA § 2(11). Thus, this distinction is only a factor to be considered in determining whether state action exists in *this* case, under the test set forth in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), and followed in *Kolinske*, 712 F.2d at 477.

The first part of the *Lugar* test examines whether the alleged deprivation of constitutional rights is caused by "the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. The second part of the test asks whether the person responsible for the deprivation may be held to be a state actor, *e.g.* the actor performed a traditional public function, was compelled to act by state law, or acted in concert with the state. 457 U.S. at 937, 102 S.Ct. at 2753. In *Kolinske*, the court

found neither part of the test satisfied, in that there was "no direct governmental involvement in either the parties' adoption of or their continued adherence to the agency shop clause." 712 F.2d at 479. The *Kolinske* court's analysis applies fully to the instant case, and plaintiffs' distinction on the facts does not affect the analysis. *See also* the discussion in *Kolinske*, 712 F.2d at 479-80, of *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), and *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) (holding that extensive state regulation did not of itself render the regulated party's activities state action).

B. The § 8(a)(3) Claim

Defendant challenges plaintiffs' § 8(a)(3) claim on the grounds that the National Labor Relations Board (NLRB) has primary jurisdiction over this claim. Defendant correctly relies on *Beck* which affirms this general rule. ___ U.S. ___, 108 S.Ct. at 2646-48. The *Beck* Court goes on to recognize, however, that federal courts may resolve such questions as "emerge as collateral issues in suits brought under independant federal remedies," such as the judicially implied duty of fair representation. *Id., quoting Connell Construction Co. v. Plumbers*, 421 U.S. 616, 626, 95 S.Ct. 1830, 1837, 44 L.Ed.2d 418 (1975).

In *Beck*, under circumstances nearly identical to this case, the Court found that "the necessity of deciding the scope of § 8(a)(3) arises because *petitioners* [the union] seek to defend themselves on the ground that the statute authorizes precisely this type of agreement [an agency shop agreement authorizing the exaction of fees unrelated to collective bargaining]." Under these circumstances, the Court held that the federal court had jurisdiction "to decide the § 8(a)(3) question raised by respondents' duty of fair representation claim." *Id.* This court finds *Beck*

indistinguishable on this point, and thus finds jurisdiction to the extent allowable under *Beck*.

C. Duty of Fair Representation

Although defendant challenged this claim in its original motion to dismiss, it has since acknowledged that plaintiffs' claim for breach of the duty of fair representation states a cognizable claim under *Beck*.

For the reasons set forth above, defendant's motion to dismiss will be granted as to plaintiff's first amendment claim, and denied as to plaintiffs' § 8(a)(3) and duty of fair representation claims.

II. Preliminary Injunction

Plaintiffs' motion for a preliminary injunction follows hard on the heels of the Supreme Court's decision in *Beck, supra*. In that case, the Court held that Section 8(a)(3) of the NLRA prohibits a union from exacting, over the objection of nonmember employees, any agency shop fees beyond those necessary to finance collective bargaining activities. Plaintiffs here seek to enjoin defendant from collecting such fees. Under the present arrangement, the union collects from the plaintiffs an amount equal to the dues of union members, but holds a portion of the fee in an interest-paying escrow account. When defendant determines the percentage of the union budget not spent on collective bargaining activities, that percentage of the fee is refunded to plaintiffs and other objecting employees.

Defendant concedes that, after *Beck*, plaintiffs have stated a claim for breach of the duty of fair representation. Indeed, defendant avows that it will change to an advance-reduction method of collection in 1989, and argues that the delay is necessary only for administrative convenience. The court is troubled by its perception that

defendant's collection system does not meet the requirements of *Beck* and by defendant's delay in so conforming the system. Nonetheless, even assuming that plaintiffs are likely to prevail on the merits, plaintiffs are not entitled to a preliminary injunction for two reasons. First, plaintiffs have failed to show the traditional common law requirement of irreparable harm necessary to the remedy of injunctive relief. See *Virginia Petroleum Jobbers Assoc v. Federal Power Com'n*, 259 F.2d 921, 925 (D.C.Cir.1958). Second, plaintiffs have not shown "special circumstances" such as to merit an exception to the well-recognized federal labor policy against injunctive relief in the area of labor disputes. See *Railway Clerks v. Allen*, 373 U.S. 113, 120, 83 S.Ct. 1158, 1162, 10 L.Ed.2d 235 (1963).

Plaintiffs claim that the payment of the excess fees into defendant's escrow account deprives them of the use of the money for their own political, charitable and other expenditures. This deprivation has been recognized as a first amendment claim. *Seay v. McDonnell Douglas, Corp.*, 427 F.2d 996, 1004 (9th Cir.1970). As the court found above, however, plaintiffs' first amendment claim is simply not cognizable in this action, where no state action is involved. Plaintiffs' claim thus becomes simply one for money damages, and it is well-recognized that money damages are rarely, if ever, irreparable. *Virginia Petroleum*, 259 F.2d at 925.

In addition, the stated harm is to some degree inevitable. Were the court to grant the injunction, plaintiffs would be required to post a bond equal to the money plaintiffs claim is being wrongfully exacted from them. 29 U.S.C. § 101; F.R.C.P. 65(c). Plaintiffs concede that they would be unable to post a bond in that amount for the 50,000 putative class members, and suggest alternatively that they pay the contested fees into the registry of the court. The court declines to adopt this burdensome suggestion and notes that, were it to do so, the resulting

burden to plaintiffs would be exactly the same. The defendant is not expending fees over their objections, but only depriving them of money which they would otherwise use for their own purposes. The preliminary injunction sought by plaintiffs would provide no remedy for this harm, as the money would be paid into the registry of the court and plaintiffs would still be deprived of its use.

Plaintiffs also fail to show that the "public interest," which they claim is in enforcing the limited-purpose collections required under *Beck*, outweighs the federal labor policy against injunctions as recognized in *Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) and *Railway Clerks v. Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963). In *Street* and *Allen*, the court found that the expenditure of agency shop fees on non-collective bargaining activities violated the RLA § (2)(11). The *Beck* court relied heavily on these decisions in holding that the NLRA § 8(a)(3) prohibited the exaction of fees for such purposes.

In *Street*, however, the Court went on to find that the use of an injunction to prohibit the collection of any fees was improper. This would be true, the Court added, even where the injunction would be subject to modification to permit collection of that portion of the fee that the union could show were spent on collective bargaining activities. 367 U.S. at 771-72, 81 S.Ct. at 1801. In *Allen*, the court likewise found an injunction improper, stating that "lest the important functions of labor organizations under the Railway Labor Act be unduly impaired, dissenting employees (at least in the absence of special circumstances not shown here) can be entitled to no relief until final judgment in their favor is entered." 373 U.S. at 120, 83 S.Ct. at 1163.

This policy against interfering prematurely with union activities, which the Supreme Court has recognized under

the RLA, is equally applicable under the NLRA. Cases cited by plaintiffs in which an injunction was found appropriate are first amendment cases and are thus inapplicable. See *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir.1987), *Lowary v. Lexington Local Bd. of Educ.*, 854 F.2d 131 (6th Cir.1988). Although first amendment claims may properly override the anti-injunctive concerns of *Street* and *Allen*, plaintiffs' *Beck* concerns do not.

For the reasons stated above, plaintiffs' motion for a preliminary injunction will be denied.

ON MOTION TO RECONSIDER OR FOR INJUNCTION PENDING APPEAL

Following the denial of plaintiffs' motion for a preliminary injunction on October 25, 1988, plaintiffs orally moved this court to reconsider the denial, and, in the alternative, filed a written motion for an injunction pending appeal pursuant to Federal Rule of Civil Procedure 62(c). After giving consideration to the points raised by plaintiffs in the motion and by defendant in its opposition, and by both parties in open court, the court concludes that plaintiffs' motions must be denied.

Plaintiffs raise a total of nine bases for reconsideration of the propriety of an injunction in this case. These bases are divided between reconsideration of the plaintiffs' first amendment claim, and reconsideration of non-first amendment related grounds for denial of the preliminary injunction. With respect to the first amendment issue, plaintiffs submit that the court's reading of *Communications Workers of America v. Beck*, ___ U.S. ___, 108 S.Ct. 2641, 101 L.Ed.2d 634 (1988), "raises the specter" of serious violations of plaintiffs' fifth amendment rights. Because the court views *Beck* as preventing even the collection of agency shop fees unrelated to collective bargaining, plaintiffs argue that to allow such collections to continue,

even if only until an adjudication of plaintiffs' rights on the merits, constitutes a deprivation of property without notice and hearing in violation of the fifth amendment. Plaintiffs argue that such collections would not occur but for the "condition of employment" language of the National Labor Relations Act § 8(a)(3) and that the resulting benefit to defendant from that language is, therefore, state action. Relatedly, plaintiffs contest the court's opinion that collective bargaining agreements between private employers and unions are *authorized*, as opposed to *mandated*, by federal law.

Plaintiffs' fifth amendment specter, in this court's view, is simply the ghost of plaintiffs' earlier first amendment claim, and is likewise ephemeral. The earlier claim argued that the collection of money under the "condition of employment" language violated plaintiffs' first amendment rights by preventing plaintiffs from using that money for their own political, charitable or other expenditures. Now plaintiffs rely on exactly the same rationale to provide state action in the collection of fees without notice and hearing.

This analysis clearly ignores the reasoning of *Kolinske v. Lubbers*, 712 F.2d 471 (D.C.Cir.1983), discussed at length in the court's first opinion, which involved facts even closer to plaintiffs' projected fifth amendment claim than to their original first amendment claim. In *Kolinske*, the plaintiff sued the union when it refused to pay him strike benefits. The Court of Appeals found no constitutional violation, not because of no deprivation of property, but because the "condition of employment" language of the NLRA was not found to constitute state action. Plaintiffs' citations of *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir.1987) where a first amendment violation was found, but where the employer was *public*, are to no avail where no state actor is involved.

In another point, plaintiffs contest this court's adoption of what appears to be the still-honored distinction between the Railway Labor Act and the NLRA, namely that while the agency shop provisions of the RLA (§ 2, Eleventh) preempt state law and thus give rise to state action, the comparable NLRA provision merely authorizes such agreements. Unlike under the RLA, actions taken under the NLRA § 8(a)(3) have not been held to independently constitute state action. *See Beck, supra; Railway Employees' Department v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956); *Steelworkers v. Sadlowski*, 457 U.S. 102, 121 n. 16, 102 S.Ct. 2339, 2350 n. 16, 72 L.Ed.2d 707 (1982); *Steelworkers v. Weber*, 443 U.S. 193, 200, 99 S.Ct. 2721, 2725, 61 L.Ed.2d 480 (1979); *Kolinske, supra* at 476.

Finally, plaintiffs cite *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944) and *J.I. Case Co. v. Labor Bd.*, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762 (1943), emphasizing in particular the metaphor used in *Steele* which compares the power and duty of unions to that of legislatures. These cases address the statutory duties imposed on unions and employers under the RLA and NLRA in furtherance of national labor policy. In *Steele*, the Supreme Court found the duty of a union not to discriminate statutorily imposed in part to avoid reaching the petitioner's constitutional claims. *Steele*, 323 U.S. at 198-99, 65 S.Ct. at 230. It is thus inconsistent to suggest that, in complying or not complying with these statutory duties, unions thereby become state actors.

Plaintiffs' second group of points relates to the court's denial of the preliminary injunction. Plaintiffs complain that, in suggesting that plaintiffs will prevail on the merits yet denying the preliminary injunction, the court in effect is saying "right writ, no remedy." Plaintiff further objects to the court's reference to the anti-injunctive provisions

and policy of the Norris-LaGuardia Act, 29 U.S.C. § 101, and to the court's finding of no irreparable injury.

The court is not saying "no remedy." The court says, as did the Supreme Court, that "dissenting employees (at least in the absence of special circumstances not shown here) can be entitled to no relief until final judgment in their favor is entered." *Railway Clerks v. Allen*, 373 U.S. 113, 120, 83 S.Ct. 1158, 1162, 10 L.Ed.2d 235 (1963). *Allen*, like the case at bar, involved the collection and expenditure of agency shop fees for non-collective bargaining purposes. Plaintiffs do not distinguish *Allen*, but instead cite two cases in which the Supreme Court found injunctions to be proper. These cases, *Steele, supra*, and *Graham v. Locomotive Firemen*, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22 (1949), illustrate precisely the type of special circumstances referred to in *Allen*. Both *Steele* and *Graham* involve racial discrimination by unions. Injunctive relief is therefore appropriate, because, as the Supreme Court stated in *International Assoc. of Machinists v. Street*, 367 U.S. 740, 773, 81 S.Ct. 1784, 1802, 6 L.Ed.2d 1141 (1961), "that remedy alone can effectively guard the plaintiff's right."

In appropriate cases, the Supreme Court has clearly stated that the Norris-LaGuardia Act does not forbid appropriate injunctive relief. (*Graham, supra* 338 U.S. at 240, 70 S.Ct. at 18). Indeed, by its own terms the Norris-LaGuardia Act does not bar injunctions, but merely calls for greater scrutiny and special safeguards in applying the remedy. But the Supreme Court has also held, in *Street* and *Allen*, that the type of monetary harm suffered by plaintiffs in the instant action does not survive that scrutiny; in other words, the furtherance of important labor functions under the RLA (and by analogy, the NLRA) outweigh the temporary monetary harm suffered by plaintiffs. The test for injunctive relief is not, as plaintiffs maintain, whether a violation of a statute has occurred.

Rather, the test involves balancing, in order "to accommodate the conflicting policies of our labor laws", the harm resulting from the statutory violation with the basic anti-injunctive policy of the Norris-LaGuardia act. *Chicago & N.W.R.Co. v. Transp. Union*, 402 U.S. 570, 582, 91 S.Ct. 1731, 1737, 29 L.Ed.2d 187 (1971). Regardless of the truth of the egregious facts plaintiffs allege with respect to C.W.A.'s accounting and administrative practices, these harms are clearly of the sort which can be most properly addressed and redressed on the merits.[1]

Finally, plaintiffs argue that their harm is not "inevitable", because, under *Tierney*, the court could order a three-tiered collection system which prevents illegal collections. The court offers no opinion on the ultimate adequacy of this remedy. The harm to which the court referred, however, is plaintiffs' loss of the use of their money regardless of whether a preliminary injunction issued, because of the bond requirements of the Norris-LaGuardia Act and Federal Rule of Civil Procedure 65(c). Although the court agrees with plaintiffs that Rule 65(c) allows the court some discretion in setting the bond requirement, the plaintiffs have cited no cases supporting such discretion under the Norris-LaGuardia Act. Plaintiffs' authority for waiving the bond requirement, *Damiano v. Matish*, 122 L.R.R.M. 3158 (W.D.Mich.1986) is a first amendment case and is thus distinguishable; moreover, if it does indeed waive the bond requirement it does so without discussion or analysis.

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[1] Indeed, pursuant to the court's expressed concern regarding defendant's collection system, defendant has taken steps to immediately effect an advance-reduction method of collection. *See* Third Declaration of Eileen Brackens, filed November 1, 1988. Although plaintiffs argue that the new system remains defective under *Beck*, nevertheless it is clear that the harm to plaintiffs has been reduced as a result.

For the reasons stated above and in the court's memorandum opinion of October 25, 1988, the court finds plaintiffs have shown insufficient injury to warrant a preliminary injunction under the standards of *Virginia Petroleum Jobbers Asso. v. Federal Powers Com'n.*, 259 F.2d 921, 925 (D.C.Cir.1958) and the Norris-LaGuardia Act. Accordingly, plaintiffs' Motion to Reconsider or for an Injunction Pending Appeal is denied.

APPENDIX C

IN THE UNITED STATES
DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Kenneth Abrams
7818 Oak Avenue
Baltimore, Md. 21234

Lawrence J. Alexander
208 Brown Avenue
Iselin, New Jersey 08830

Ingeborg Chaban
74 Grant Avenue
New Providence, N.J. 07974

James F. Flagle
3049 Arizona Ave.
Baltimore, Md. 21234

Plaintiffs,

v.

Communications Workers of America (C.W.A.), an unincorporated labor organization
Serve: Morton Bahr, President
1925 K Street, N.W.
Washington, D.C. 20006

Defendant.

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Johnson J.

Civil Action No. 87-2816

CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (Labor-Political Action)

JURISDICTION

1. This Court has jurisdiction over the claims for relief stated herein by virtue of:

Title 28 U.S.C. § 1331, in that the matters in controversy arise under, or under color of, the constitution and laws of the United States, to wit:

(a) the First and Fifth Amendments to the United States Constitution;

(b) § 9(a) of the National Labor Relations Act (NLRA), 29 U.S.C. § 159(a);

(c) § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3);

(d) § 301 of the NLRA, 29 U.S.C. § 185; and

Title 28 U.S.C. § 1337, in that they derive from an act of Commerce regulating commerce, to wit: the NLRA, 29 U.S.C. §§ 141 *et seq.*

PARTIES

2. Plaintiffs and class members are citizens of the United States, residents of the States of Maryland or New Jersey, who work in that State, and are employees of employers in interstate commerce, as defined in NLRA § 2(2), 29 U.S.C. § 152(2). Their employers have, and plaintiffs are subject to, collective bargaining arrangements with the defendant labor organization which require them to pay fees to defendant as a condition of their employ-

ment. Plaintiffs are not themselves members of the defendant labor organization.

3. Defendant Communications Workers of America (CWA) is a labor organization, as defined in NLRA § 2(5), 29 U.S.C. § 152(5), which is operating in interstate commerce. It has collective bargaining arrangements with plaintiffs' employers, to which plaintiffs are subject. It has been recognized or certified as plaintiffs' exclusive "representative" under, or under color of, 29 U.S.C. § 159. Its primary office is in the District of Columbia.

CLASS ALLEGATIONS

4. Plaintiffs bring this action on behalf of themselves and all other nonmembers of the CWA employed by employers in interstate commerce who are subject to collective bargaining arrangements made under or under color of NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3), and § 9(a), 29 U.S.C. § 159(a), which require them to pay fees to the CWA as a condition of employment. On information and belief, there are so many of said nonmembers that it is impracticable to bring them all before the court; there are questions of law or fact presented herein which are common to that class of nonmembers; the claims of the plaintiffs herein are typical of the claims of the said class; the plaintiffs will fairly and adequately protect the interests of the said class; and the defendant has acted on grounds generally applicable to the class, thereby making appropriate injunctive and other relief with respect to the class as a whole.

FACTS

5. Under, or under color of, § 9 of the NLRA, 29 U.S.C. § 159, defendant CWA was certified or recognized as "exclusive representative" for plaintiffs solely for the purposes of collective bargaining with plaintiffs' employer.

In that capacity defendant negotiated with plaintiffs' employer and enforces provisions of collective bargaining agreements which, under or under color of § 8(a)(3), 29 U.S.C. § 158(a)(3), require plaintiffs, as a condition of their employment, to pay to defendant CWA periodic fees which are equal to the amounts CWA charges its voluntary members as dues. Plaintiffs are not members of CWA, have not voluntarily associated with CWA, and pay fees to CWA only because it is required as a condition of their employment.

6. With the fees exacted from plaintiffs under, or under color of, §§ 8(a)(3) and 9(a), CWA engages in political and ideological activities not authorized by the plaintiffs, not required by any section of the NLRA, and which plaintiffs cannot be compelled to finance under the First Amendment.

7. Among those political activities which defendant CWA finances directly and indirectly from plaintiffs' coerced fee payments is a campaign to prevent the confirmation of Robert H. Bork, sitting Judge on the United States Court of Appeals for the District of Columbia, as Justice of the United States Supreme Court. This is and has been done through:

(a) lobbying members of the Judiciary Committee of the United States Senate to prevent a favorable report of the nomination to the full Senate;

(b) lobbying members of the United States Senate to prevent the Senate's "advice and consent" to the nomination, irrespective of the actions of the Judiciary Committee;

(c) preparing and disseminating propaganda tracts directed to

(1) members and their families;

(2) media and other opinionmakers;

(3) the academic community; and

(4) the public.

8. CWA's subsidization of these activities with exactions from plaintiffs violates the NLRA and the First Amendment, and its failure to give plaintiffs notice and an opportunity to prevent such uses, even if only temporary, violates the First and Fifth Amendments. Without this Court's intervention, plaintiffs have no means to prevent this ongoing violation of their statutory and constitutional rights. As a result, they are suffering irreparable harm to their rights and liberties which cannot fully be remedied by subsequently awarded money damages.

PRAYERS FOR RELIEF

Wherefore, plaintiffs pray for:

(a) an order certifying that this action may be maintained as a class action and describing the class as all nonmembers of CWA who are employees of employers in interstate commerce and who are subject to collective bargaining arrangements made under color of NLRA §§ 8(a)(3) and 9(a) which require them to pay fees to the CWA as a condition of employment.

(b) preliminary and permanent injunctions preventing CWA from demanding, exacting, collecting, or using plaintiffs' monies for non-bargaining purposes, including the campaign against the confirmation of Robert H. Bork to be a Justice of the United States Supreme Court.

(c) the return to them, with appropriate interest, of the amounts of their monies CWA has exacted for non-bargaining purposes;

(d) attorneys fees; and

(e) costs of this suit.

/s/
Hugh L. Reilly, Bar No. 137612

/s/
Raymond J. LaJeunesse, Bar No. 124958
Counsel for Plaintiffs
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Dated:

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH ABRAMS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. 87-2816 RCL
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,	)	
	)	
	)	
Defendant.	)	
	)	

ANSWER

Defendant Communications Workers of America answers the plaintiffs' complaint as follows:

1. The allegations of paragraphs 1, 2, 3 and 5 are admitted.

2. The allegations of paragraphs 4, 6, 7 and 8 are denied.

Wherefore, the defendant prays that this complaint be dismissed and that it be awarded its costs in defending this action, including attorneys' fees.

Respectfully submitted,

/s/
James B. Coppess
D.C. Bar No. 347427
1925 K Street, N.W., Suite 411
Washington, D.C. 20006

Of Counsel:

Michael T. Leibig
1025 Connecticut Avenue
Suite 307

Washington, D.C. 20036 (202) 728-2456

Attorney for defendant
Communications Workers of
America, AFL-CIO

[November 3, 1988]

[certificate of service omitted]

APPENDIX E

AFFIDAVIT

City of Baltimore
State of Maryland

I, Kenneth F. Abrams, reside at 7818 Oak Avenue, Baltimore, Maryland, 21234. I am over 21 years of age, competent to testify under the laws of the State of Maryland, and the District of Columbia. I have personal knowledge of the contents of this affidavit.

I am employed by C & P Telephone Company at 4210 Shannon Drive, Baltimore, Md. 21213. I have been employed by the Company for 15 years. I am an automotive equipment mechanic.

At one point I was a member of Communications Workers of America, Local 2101. I resigned my membership in December of 1980 by registered letter. I never received any response from the Union to that letter.

In January of 1981 I checked with company payroll offices to obtain a reduction in the Union's fees. They told me to go to the Union. I did so, by contacting the Union Steward. He told me he would check on it, but I have not heard anything in response since.

Before September of L986 I was not aware that I had any rights to a reduction of the dues-equivalent fees of the Union. If I had known, I would have made claims immediately.

My first request for a reduction of the fee to the Union's cost of collective bargaining was in about September, 1986. I sent that in writing to Local 2101. I did the same thing in 1987. In about June of 1988, I sent another reuqest, to the CWA National Office.

The first response I had to any of these requests is the letter of October 4, 1988 from James Booe (Exhibit A). It enclosed a check for $50.93 to cover the reduction CWA claims is due for the 1987 calendar year. I have received nothing for prior years.

/s/
Kenneth F. Abrams

On the 10th day of October, 1988 personally appeared Kenneth F. Abrams who affirmed that the contents of this affidavit are true.

/s/
Notary Public

July 1, 1990

Communications Workers of America
AFL-CIO

1925 K Street, N.W.
Washington, D.C. 20006
202/728-2319

October 4, 1988

File: 1.7
1.22

Local: 2100 PU #0000074
Kenneth F. Abrams
7818 Oak Avenue
Baltimore, Maryland 21234

Enclosed is a check which represents payment of the agency fee rebate requested by you for the period January 1, 1987 through December 31, 1987 under the CWA Policy on Rebates.

The calculation of your rebate is explained on the attached sheet. This sheet shows the portion of each month's payment from you that went to the national union and the portion that went to the local. It also shows the rebate percentage for the national union and the rebate percentage for the local. Finally, it shows that your rebate includes interest for the period your money was held.

Also enclosed are the accountants' report showing the

EXHIBIT A

national union's calculation of chargeable and nonchargeable expenditures, a summary of your local's calculation, and a list of expenditures classified as chargeable or nonchargeable. In these materials the words "chargeable" and "retainable" signify the expenditures your fee was used to support.

You may challenge the union's classification of expenditures or its calculation before a neutral arbitrator appointed by the American Arbitration Association, and if you choose to do so, a portion of your fee will remain in escrow until the arbitrator rules on your challenge. At the arbitration, it will be CWA's burden to prove the accuracy of its calculation. However, in advance of the hearing objectors challenging the calculation will be allowed to inspect the supporting accounting documents, if they wish. To challenge the calculation, write to the following address within thirty days of receiving this letter:

Agency Fee Appeal
Office of the Secretary-Treasurer
Communications Workers of America
1925 K Street, N.W.
Washington, D.C. 20006

CWA has recently amended its policy on agency fee objections. The new policy is explained in the October 1988 issue of the CWA News. A copy of this notice is enclosed.

Sincerely,

/s/
James B. Booe
Secretary-Treasurer

K. F. Abrams
Page 2
October 4, 1988

Enclosures

cc: President
Executive Vice President
Vice President
CWA Representative
Local President

/bh

APPENDIX F

AFFIDAVIT

I am John T. McConnell, Sr. I reside at 15312 Valencia St. Silver Spring, Maryland. I am a central office technician and employed by the C & P Telephone Company at 7833 Walker Drive, Greenbelt, Maryland, and I have been employed by the Company for 22 years. I have personal knowledge of the contents of this affidavit. I am not a member of the Union, but resigned Aug. 8, 83.

My employment is governed by a collective bargaining agreement the Company has with the Communications Workers of America. That agreement requires that I pay dues-equivalent amounts to the Union as a condition of employment. I object to those payments and first wrote to the Union about it on September 6, 1985 (Exhibit 1). On March 17, 1986, I wrote a duplicate of that letter (Exhibit 2). I received a response to that letter which was dated June 20, 1986 (Exhibit 3). I received a second response which was dated May 29, 1987 (Exhibit 4). I next wrote to the Union on February 1, 1988 (Exhibit 5). In early September, 1988 I called Mr. Booe's office by phone; I was told that someone would call me back, but no one has.

JTM[c]

Over the course of this correspondence, I have not received a reduction in my dues, an accounting of how my money is spent, nor an answer to my phone conversation, nor any response to my correspondence other than the Exhibits noted above.

/s/
John T. McConnell

PG
~~Montgomery~~ County
State of Maryland

On the 10th day of Oct, 1988, personally appeared John T. McConnell who affirmed that the contents of this Affidavit are true.

/s/
Notary Public

My commission expires:
come July 1, 1990

11359 Columbia Pike
Apt. C-8
Silver Spring, MD 20904

September 6, 1985

Local 2108
Communications Workers of America
4301 Garden City Drive
Landover, Maryland 20785

Re: Notice of Protest and Demand for Reduction of Dues Obligation to Equal Only the Pro Rata Costs of Collective Bargaining Activities.

To whom it may concern:

You are hereby formally notified of my objection under the First and Fourteenth Amendments to the United States Constitution to the deduction, retention even temporarily, and expenditure of dues/fees from my paycheck for any purposes other than paying the costs of:

1. Negotiating collective bargaining agreements with my employer.

2. Administering collective bargaining agreements with my employer; and

3. Processing grievances at my request with my employer.

It is my belief that my dues/fees have been, are now, and will in the future be used for other than these three-enumerated purposes, including but not limited to political,

ideological, social, economic, and/or philosophic purposes or activities of all kinds or nature. I specifically protest and object to the use of my dues/fees for all such noncollective bargaining activities.

Therefore, as is my right under the Supreme Court decisions in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Ellis, et al. v. BRAC*, 104 S. Ct. 1883 (1984), I hereby demand that the amount of my dues/fees be immediately reduced to an amount representing only the pro rata amount necessary for collective bargaining, contract administration and grievance adjustment with my employer, and that all dues collected from my paycheck since my resignation of August 8, 1983, be returned to me as well. I also demand that any questionable amount not reduced in advance be placed in an interest-bearing escrow account and that refunds, if any, be made with interest.

Please have the courtesy to reply promptly to this letter.

Sincerely,

John T. McConnell

cc: C & P Telephone Company
of Maryland

[proof of receipt omitted]

11359 Columbia Pike
Apt. C-8
Silver Spring, MD 20904

March 17, 1986

Local 2108
Communications Workers of America
4301 Garden City Drive
Landover, Maryland 20785

Re: Notice of Protest and Demand for Reduction of Dues Obligation to Equal Only the Pro Rate Costs of Collective Bargaining Activities.

To whom it may concern:

You are hereby formally notified of my objection under the First and Fourteenth Amendments to the United States Constitution to the deduction, retention even temporarily, and expenditure of dues/fees from my paycheck now and ever after for any purposes other than paying the costs of:

1. Negotiating collective bargaining agreements with my employer.

2. Administering collective bargaining agreements with my employer; and

3. Processing grievances at my request with my employer.

It is my belief that my dues/fees have been, are now, and will in the future be used for other than these three-enumerated purposes, including but not limited to political,

ideological, social, economic, and/or philosophic purposes or activities of all kinds or nature. I specifically protest and object to the use of my dues/fees for all such noncollective bargaining activities.

Therefore, as is my right under the Supreme Court decisions in *Abood v. Detroit Board of Education*, 431 U. S. 209 (1977), and *Ellis, et al. v. BRAC*, 104 S. Ct. 1883 (1984), I hereby demand that the amount of my dues/fees be immediately reduced to an amount representing only the pro rata amount necessary for collective bargaining, contract administration and grievance adjustment with my employer, and that all dues collected from my paycheck since my resignation of August 8, 1983, be returned to me as well. I also demand that any questionable amount not reduced in advance be placed in an interest-bearing escrow account and that refunds, if any, be made with interest.

Please have the courtesy to reply promptly to this letter.

Sincerely,
/s/
John T. McConnell

cc: C & P Telephone Company
of Maryland

Richard J. Clair
National Right to Work
Legal Defense Foundation, Inc.

[proof of receipt omitted]

Communications Workers of America
AFL-CIO

1925 K Street, N.W.
Washington, D.C. 20006
202/728-2319

Office of the Secretary-Treasurer

June 20, 1986

LOCAL: 2108 PU #0000073
MCCONNELL#JOHN T
11359 COLUMBIA PIKE
C-8
SILVER SPRING, MD 20904

File: 1.7
1.22

We have received your letter requesting a rebate under CWA's Policy on Rebates and have processed your request. You will receive a rebate for the period January 1, 1986 through December 31, 1986 in 1987 when the Union's calculations are completed.

Sincerely,

/s/
James B. Booe
Secretary-Treasurer

cc: Morton Bahr, President
Executive Vice President
Vice President
CWA Representative
Local President

/bh

EXHIBIT 3

Communications Workers of America
AFL-CIO

1925 K Street, N.W.
Washington, D.C. 20006
202/728-2319

May 29, 1987

File: 1.7
1.22

LOCAL: 2108 PU #0000074
MCCONNELL#JOHN T
15312 VALENCIA ST
SILVER SPRING MD 20904

Dear Colleague:

We have received your letter requesting a rebate under CWA's Policy on Rebates and have processed your request. You will receive a rebate for the period January 1, 1987 thru December 31, 1987 in 1988 when the Union's calculations are completed.

Sincerely,

/s/

James B. Booe
Secretary-Treasury

/awd

cc: Morton Bahr, President
Executive Vice President
Vice President
CWA Representative
Local President

EXHIBIT 4

February 1, 1988

Mr. James B. Booe
Secretary/Treasurer
CWA - Local 2108
1925 K Street, NW
Washington, DC 20006

Dear Mr. Booe:

Enclosed are copies of two letters from your organization regarding rebate of past union dues for 1986 and 1987. I have yet to receive a check for either year.

Please keep in mind that I request the same rebate for union dues for the year 1988.

Your prompt reply would be greatly appreciated. Thank you.

Sincerely,

J. T. McConnell, Sr.
15312 Valencia Street
Silver Spring, MD 20904

JRM/d

Enclosures

cc: Richard Clair
National Right to Work League
Defense Foundation, Inc.

EXHIBIT 5

APPENDIX G

IN THE UNITED STATES
DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Kenneth Abrams, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action
v.	)	No. 87-2816 (RCL)
	)	
Communications Workers of America (C.W.A.),	)	
	)	
	)	
Defendant.	)	
	)	

AFFIDAVIT OF CHARLES R. SERIO

COUNTY OF Anne Arundel :
: ss
STATE OF MARYLAND :

I, Charles R. Serio am over twenty-one years of age, competent to testify under the laws of Maryland and the District of Columbia, and I have personal knowledge of the contents of this affidavit.

I reside at 425 Madingley Road, Linthicum, Maryland 21090 and at all relevant times have been employed by the Chesapeake and Potomac Telephone Company. My employment is governed by a collective bargaining agreement my employer has with the Communications Workers of America (CWA) to the extent that agreement is lawful.

At one point, I had been a member of CWA, but I resigned from membership by letter of September 1, 1986 (Exhibit A hereto).

On September 9, 1986, I wrote to the union concerning the amount of the agency fee and an accounting of how the fee was determined (Exhibit B hereto). I received the letter of November 10, 1986, from Stephens J. Olney, Jr., saying "[i]n answer to your question on agency fees, they are the same as the established dues . . . ." (Exhibit C hereto).

On May 29, 1987 I received a letter from the union denying me a "rebate under CWA's policy on rebates . . . ." (Exhibit D hereto). In that letter, Mr. Booe claims I am "a member" despite my resignation in Exhibit A, above, and Ms. Easterling's acknowledgement of that resignation by letter of September 25, 1986 (Exhibit E hereto).

The union continues to demand that I pay dues-equivalent amounts as a condition of employment. It has not provided me with: an independent auditor's certification of the union's costs of collective bargaining on my behalf in negotiations with my employer; a reduced fee equal to the amount of the independent auditor's certification; a neutrally administered escrow account for holding portions of fees reasonably in dispute following the auditor's certification; a true arbitration for the pre-judicial determination of the union's collective bargaining costs; or with any evidence substantiating the claim that the union's collective bargaining activity is to my "actual benefit".

/s/
Charles R. Serio

On the 9th day, of October, 1988
personally appeared before me a notary
public in and for said county Charles R. Serio
who affirmed that the contents of this
affidavit are true.

/s/
NOTARY PUBLIC

My commission expires: July 1, 1989

415 Madingley Road
Linthicum, Maryland 21090
September 1, 1986

President
CWA Local 2101
5405 York Road
Baltimore, Maryland 21212

Dear Sir:

Over the past two years, I have made known to the CWA leadership, on the national and local levels, my dissatisfaction with the political activities undertaken on my behalf by the Communications Workers of America. During this period, the extremist nature of these activities has not moderated. To the contrary, CWA has joined with the radical group Transafrica in demonstrating in front of the South African embassy and calling for economic sanctions. In October of 1985, CWA actively collaborated with the abortion lobby by publishing the propaganda of the Population Institute in the *CWA NEWS*. Presently, the union is actively opposing, in Congress, the Strategic Defense Initiative and virtually all other major weapons procurement programs. Since the CWA leadership continues to use the union as a means to advance the agenda of the radical left, I feel that I have no alternative except to sever my connection with CWA. I therefore resign from the Communications Workers of America, effective immediately.

Sincerely,

/s/
Charles R. Serio

EXHIBIT A

cc: Robert D. Lynch
Chesapeake and Potomac Telephone Co.
of Maryland
323 North Charles Street
Room 901
Baltimore, Maryland 21201

President
Communications Workers of America
1925 K Street, N.W.
Washington, D.C. 20006

415 Madingley Road
Linthicum, Maryland 21090
September 9, 1986

President
Communications Workers of America
1925 K Street, N.W.
Washington, D.C. 20006

Dear Sir:

I object to the collection and expenditure by the union of a fee for any purposes other than my pro rata share of the union's costs of collective bargaining, contract administration, and grievance adjustment.

Pursuant to the recent decision of the United States Supreme Court in *Chicago Teachers Union, Local No. 1 v. Hudson*, __U.S.__(March 4, 1986), I demand that you provide minimal due process rights, including notice of the amount of the fee, an accounting of how the fee was determined, and a prompt review of that amount by a neutral decision-maker. Please reply promptly to my request. Any deduction or expenditure made without providing those minimal protections will be a clear violation of my civil rights under 42 U.S.C. 1983.

Sincerely,

/s/
Charles R. Serio

cc: President
CWA Local 2101
5405 York Road
Baltimore, Maryland 21212

EXHIBIT B

Robert D. Lynch
Chesapeake and Potomac Telephone Co.
of Maryland
323 North Charles Street
Room 901
Baltimore, Maryland 21201

Communications Workers of America
AFL-CIO

1925 K Street, N.W.
Washington, D.C. 20006
202/728-2344

File 9
x 1.36
x 1.14

November 10, 1986

Mr. Charles R. Serio
415 Madingley Road
Linthicum, Maryland 21090

Dear Mr. Serio:

Executive Vice President Barbara J. Easterling has referred your letter of October 28, 1986 to me for response.

It does not appear that there is much more we can say or do to convince you to re-establish your membership in CWA. However, I must correct you on two points: First, the official policy of CWA is not to oppose the government of El Salvador but to support them so long as they allow free trade unions to function -- for the most part this is being accomplished. Secondly, CWA is not, nor have they ever been, affiliated or supportive of the Population Institute.

Free Trade Unions understand clearly that authoritarian governments to the right or left will not tolerate our existence, therefore, you can be assured that CWA will act cautiously before supporting any government.

In answer to your question on agency fees, they are the same as the established dues of your Local which has been

set either by the CWA Convention Delegates or your Local Membership.

If you have further concerns regarding our position in the area of international affairs, please feel free to contact Louis E. Moore, Director, International Affairs at (202) 728-2496 or myself at (202) 728-2346.

Respectfully,

/s/
Stephen J. Olney, Sr.
Assistant to Executive Vice President

cc: Barbara J. Easterling
John Carroll
Pete Catucci
Louis E. Moore
Edward Johnson

Communications Workers of America
AFL-CIO

1925 K Street, N.W.
Washington, D.C. 20006
202/728-2319

May 29, 1987

File: 1.7
1.22

LOCAL: 2101 PU #0000074
SERIO#C R
415 MADINGLEY RD
LINTHICUM MD 21090

Dear Colleague:

We received your letter requesting a rebate under CWA's Policy on Rebates during the prescribed time period. Your request does not meet our current dues rebate policy as you are a member rather than a non-member covered by a Collective Bargaining Agreement containing an Agency Shop Provision.

The complete rebate policy that covers this rebate period was printed in the October 1986 issue of the CWA News and a copy is enclosed.

Sincerely,

/s/
James B. Booe
Secretary-Treasurer

/awd
Enclosure

EXHIBIT D

cc: Morton Bahr, President
Executive Vice President
Vice President
CWA Representative
Local President

Communications Workers of America AFL-CIO
1925 K Street, N.W.
Washington, D.C. 20006
202/728-2344

File: 1.36
x1.14

September 25, 1986

Charles R. Serio
415 Madingley Rd.
Linthicum, MD 21090

Dear Mr. Serio:

President Bahr has referred your letter to me. I'm sorry that you have decided to resign from the union because CWA is what the members make it. Every member has the ability and opportunity to voice his or her opinions on all issues -- from collective bargaining to politics. The membership determines the union's policies, priorities and objectives. For example, the democratically-elected convention delegates wrote, debated and adopted our policies regarding South Africa.

It is this democratic process that makes us strong. I'm sorry that you seem to feel that resignation, rather than participation, was the best way to affect your union's policies.

Furthermore, CWA's positions are wide-ranging and not limited to the few you mention. The union actively seeks to protect the members' interests in countless ways in the

political arena. Proposed revisions of telecommunications laws and regulations, potential tax changes that could reduce take-home pay, health and safety concerns and fair trade policies are but a few of the many areas in which CWA is involved. Ours is not the "agenda of the radical left;" it is merely to ensure that our members fully enjoy all the benefits, rights and privileges which we have earned and to which we are entitled.

Finally, the union is far more than a politically active organization. We bargain hundreds of contracts each year, protect countless members from violations of contract provisions, devote hours and dollars to community services in virtually every town and city across the nation, help members secure new opportunities, etc. The list could go on and on.

All in all, the union is a highly respected, active, vibrant organization. But it really is far more than just an organization -- it is the collection of people who are its members. I hope you will reconsider your decision and rejoin this family we call CWA.

Sincerely,

/s/
Barbara J. Easterling
Executive Vice President

cc: Morton Bahr, President
Edward Johnson, President
CWA Local 2101
John Carroll, Exec. Vice President
Pete Catucci, Vice President

APPENDIX H

IN THE UNITED STATES
DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Kenneth Abrams, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. 87-2816 NHJ
Communications Workers	)	
of America (C.W.A.),	)	
	)	
Defendant.	)	
	)	

Fairfax Co.	)	
	)	SS
Commonwealth of Virginia	)	

AFFIDAVIT

I, Barbara Yezek, reside at 12715 Colby Drive, Woodbridge, VA 22192, am employed as a paralegal with the National Right to Work Legal Defense Foundation in Springfield, Virginia, I am competent to testify under the laws of Virginia and the District of Columbia, and I have personal knowledge of the contents of this affidavit.

At the request of Hugh L. Reilly, an attorney with the Foundation, I reviewed the entire trial transcript in criminal proceedings in *United States v. Martin J. Hughes*, Criminal Action No. CR 86-98 in the District Court of the United States for the Northern District of Ohio, Eastern Division. The transcript covers 17 volumes of testimony in proceedings before Judge Ann Aldrich beginning on July 1, 1987 and ending on July 27, 1987. At Mr. Reilly's

request, I have summarized and indexed those proceedings and testimony to prepare this affidavit.

The transcript shows that Mr. Hughes was a Vice President of the Communications Workers of America, with offices in Cleveland, Ohio. In that criminal case, Mr. Hughes was convicted of falsifying expense vouchers to make contributions from CWA's general account (and not its separate political account) to candidates for political offices and staff of the union's credit union.

CWA has vouchers (so-called "blue vouchers) for the expense of part-time employees. Mr. Hughes, through several employees of the District Office's secretarial staff, created false expense vouchers, the testimony shows. The amount of general treasury money to be given was determined, and the political candidate to receive it identified. The "blue voucher" was filled in by the secretary naming the political candidate as a part-time employee, just as though those political candidates were CWA's part-time employees, which they were not. The amount determined to be received by the political candidate was vouchered in two ways, expenses, such as meals, and vehicle mileage. When the false meals total did not reach the total political contribution, false mileage charges were created to make up the differences. The office maintained a map and chart of mileages to various cities from District offices, so that the false voucher system could be used to create vouchers as quickly as possible. The secretary, with Mr. Hughes' approval, then forged the signatures on the vouchers of each recipient. Similar procedures were used to pay credit union staff, who were also not union employees.

This scheme was not in use solely in District 4. Morton Bahr, former Vice President from District 1 (New York, New Jersey and New England) testified to the effect that similar scheme was used there for the same purpose.

The checks for the vouchered "expenses" in these instances were not written in the District offices, but were written in CWA headquarters in Washington, D.C.

Marilyn Podracky, a former District 4 employee, testified:

Q And you indicated that you used a map; [in preparation of blue vouchers] is that right?

A That's correct.

Q And how would you use a map? Or why would you need a map, first of all?

A To judge distance. I mean you kind of knew how far it was from here to Columbus or here to Toledo. And myself I would just figure, well, that's 120 miles or that's 60 miles and then, so this might be the same, and then I would double because you down -- you use varying cities -- so if Columbus was 120 miles one way, it would be 240 miles. And then you figure how many miles you might drive within the city to make it look or appear reasonable and then just figure it out.

I mean I would just kind of take a little sheet of paper and if I were to get $200 for this month, let's say, I will say maybe a hundred in meals and figure the rest with mileage and come up with miles that would equal that times 20 cents or 18 cents a mile, whatever it was at the time, or 15 cents.

Q At times did you claim wages?

A At times, yes.

Q After you completed the blue voucher, what did you do with it now?

A I turned it in to Marty Hughes.

Q Do you know what he did with it after he received it?

A One copy was kept in Cleveland and the blue copy went to Washington.

Q And did you subsequently receive a check from the CWA?

A Yes, I did.

Q And where did you receive this check?

A At my home.

[Podracky, Tr. 334-36]

Judith Thompson, secretary at District 4, July 1979-September 1985, testified:

Q You explained to us then the procedure under which you would fill out a voucher for either somebody who's a candidate or for somebody who was an employee at the credit union.

A If it was for an individual who was previously paid on a voucher, the yellow copy would be -- we receive a yellow copy of the voucher which had the individual's name, address, Social Security number, car insurance information on it. And there would be a small slip of paper, maybe a three by five white slip of paper with a voucher number and an amount on it and you just followed the yellow copy of the voucher in preparing the one that you were working on.

Q So by yellow voucher, what are you referring to?

A The yellow copy, which would be the carbon copy of the voucher.

Q Would that be a prior voucher?

A Yes, yes.

Q Were you familiar with the person whose handwriting was on the small slips of paper, who was giving you the amounts and the pay period?

A It was from Marty.

Q Once you got the prior yellow copy of the voucher and the slip of paper with the pay period and amount, what would you do?

A Fill out the person's name and address and all the information at the top. . . .

And you would just fill in the person's name, the other information, and look at whatever the pay period that you were using, fill in the proper dates, and we would probably go down and fill in -- when I left, it was $25 a day was allowed for meals and miscellaneous. So the easiest way to do it would be just fill in $25 for five days and come up with a total and then for the rest of the voucher we would go to the personal car column and use a map and find a city and calculate whatever the round trip may have been to and from that city. And whatever the total of the voucher was, you came up with the amount for what the personal car would be minus the meals and miscellaneous and it would total the total amount of the voucher.
[Thompson, Tr. 84-85]

Q How did you decide in filling this out on the particular cities that were used -- Cincinnati, Hamilton and so forth?

A After doing so many of them, you kind of just memorize how much mileage you're looking for.

Q In filling these out -- well, throughout the period of time you worked at CWA and there were vouchers for political contributions, did you fill them out all in the same way essentially?

A Yes.

* * * * *

Q My question is: When you put down cities in any of the situations where you filled out that section, to your knowledge, were you putting that information as to actual trips that you had been made aware of?

A Not to my knowledge.

Q And with meals, when you fill out meals, were there any circumstances where you had been given information that there were actual meals that were being reimbursed?

A No.

Q Also in the lower corner below the point to point, is there room for insurance?

A Yes.

Q And how is it the decision was made as to what information would be written down as to an insurance policy number and insurance company?

A There were times when I got more involved with being responsible for all of these vouchers that I would request the information for the individual, but most of the time we had a file cabinet of file vouchers and just went to the file cabinets and randomly picked a voucher and took an insurance company and number off of it. [Thompson, Tr. 89-91]

Q And was there any particular campaign or campaigns where you were particularly active in getting information and preparing vouchers on your own?

A During the big elections, the state-wide elections, I was preparing vouchers for basically all the state officeholders.

Q How much of your time would this take you?

A I would say probably out of a week maybe I'd, say, spend at least one to two days just preparing vouchers.

Q Let me ask you, with respect to the total amounts of the vouchers, any one given voucher, how did you determine what the total amount would be?

A Usually the amounts always seemed to be round numbers, say $500, a thousand dollars. We'd always try to round it off and make it try not really even. In the instance if the voucher -- I'm sorry -- if the payment, say, was a thousand dollars, say I'd make one voucher 502, the next 498, I would split it in two vouchers and prepare one maybe every other week or prepare them both at the same time and just use a second week and hold on to it and not mail it in right away.

Q What was the reason you did it that way, saving them up and splitting the amounts?

A Because that's the way Marty Hughes told me to do it.
[Thompson, Tr. 100]

Barbara Easterling, former CWA staff representative in District 4, presently executive vice president in Washington, D.C.

Q And let me ask you specifically if you became aware of the use of blue vouchers to make payments and/or contributions to political candidates or campaign workers?

A Yes.

Q When did you become aware of that?

A Shortly after I went on staff.

[Easterling, Tr. 2381]

Q Did you know that those vouchers were filled out with fictitious information with respect to trips taken and meals eaten?

A Yes.

Q During the period of time that you were aware of that practice, did you think it was wrong?

A No.

Q Why not?

A The procedure was in effect when I arrived there. The accounting, we had district accounting of all political

funds so that the individual that was receiving the money or that was listed on the voucher received the check and it was reported, became a matter of public record and I saw nothing wrong with the procedure. It really never entered my mind to be honest with you.

* * * *

Q Since then I take it you have thought about it?

A Yes.

Q Especially since Mr. Hughes has been charged in this case on the basis of those things.

Knowing what you now know, do you view those vouchers as false vouchers?

A The procedure perhaps raises some question, but the facts remain that the money was given to the candidate, it was reported, it became a matter of record. All of our activities were fairly common knowledge with the local people that contributed the money and I have no problem with it.
[Easterling, Tr. 2382-83]

Morton Bahr testified in approval of this scheme. Mr. Bahr was their District 1 Vice President. He is now the CWA National President. He testified:

Q Now, with respect to the question of whether or not Mr. Hughes intentionally deceived anyone at the international or elsewhere with respect to the practice that was employed to make those contributions, do you have an opinion?

A Yes.

Q What's your opinion?

A Just no way would Marty Hughes do anything that would either bring shame upon his family or this union into disrepute, absolutely no way.
[Bahr, Tr. 2304]

Q Let's talk about nonfederal contributions, yes.

A Nonfederal. The district vice president has the sole, complete authority to make contributions at the state and local level. And it could be done through a number of ways.

It can be done through the use of blue vouchers, which are the part-time vouchers; it could be used through requesting a check from the secretary-treasurer's office made out to a candidate for a certain amount of dollars; it could be done through picking up printing bills for a candidate; it could be done through the use, making our telephones available to candidates where we pay the telephone bills.
[Bahr, Tr. 2277]

/s/
Barbara Yezek

On the 11th day of October, 1988 Barbara Yezek personally appeared before me and affirmed that the contents of this affidavit are true.

Susan D. Wenger
Notary Public

My commission expires: July 24, 1990

(2)

No. 89-580

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

KENNETH ABRAMS, *et al.*,
Petitioners,

v.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below abused their discretion in denying a preliminary injunction against the collection of agency fees.

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BRIEF IN OPPOSITION

The opinions below, the basis for this Court's jurisdiction, and the constitutional and statutory provisions involved are correctly described in the petition for *certiorari*. Pet. 1-4.

STATEMENT OF THE CASE

1. This action was brought by four employees of private telephone companies (petitioners in this Court), who work in collective bargaining units represented by the Communications Workers of America ("CWA" or "Union"), and who pay agency fees to CWA pursuant to collectively bargained union security provisions. The complaint alleges that CWA has committed constitutional

and statutory violations in its administration of these agreements.

As the district court noted in one of the rulings challenged here, CWA has maintained an internal procedure for accomodating the objections of nonmember fee payers that was modified following this Court's decision in *Communications Workers v. Beck*, —— U.S. ——, 108 S.Ct. 2641 (1988), to insure that the Union's procedure is in full compliance with the requirements stated in that opinion. Pet. App. 17a n. 1.

Under the CWA procedure, agency fee payers are annually reminded of their right to object to supporting union political expenditures as well as other expenditures not germane to collective bargaining. The notice reminding fee payers of this right also explains which expenditures will be charged to objecting fee payers and which expenditures will not be so charged. Objecting fee payers receive an advance reduction payment based on the Union's audited allocation of its previous year's expenditures into the chargeable and nonchargeable categories, and premised on the expectation that the objectors will pay fees throughout the entire year of objection. Along with the advance reduction payment, each objector receives a detailed list of expenditures broken down into the chargeable and nonchargeable categories, and the special report of the certified public accountants who audited the Union's allocation of expenditures. An objector may challenge the calculation of the advance reduction before an arbitrator appointed by the American Arbitration Association, and while a challenge is pending forty percent of the objector's reduced fee payment is held in escrow. Appendix in *Abrams v. Communications Workers*, D.C.Cir. No. 88-7234, pp. 62-90. *Compare* NLRB General Counsel Memorandum 88-14 (Nov. 15, 1988) (interpreting *Communications Workers v. Beck, supra*) *with Chicago Teachers Union v. Hudson*, 475 U.S. 292,

310 (1986) (establishing the "constitutional requirements" for public sector union security agreements).

2. After preliminary proceedings, the district court (Lamberth, J.) entered an order (i) dismissing the petitioners' constitutional claims, (ii) denying their motion for a preliminary injunction, and (iii) setting down the petitioners' statutory fair representation claims for consideration on a motion for summary judgment to be filed by the defendant Union.[1] Order of Oct. 25, 1988. The petitioners moved for reconsideration of the denial of a preliminary injunction, or in the alternative for an injunction pending appeal. The district court denied these motions. Pet. App. 13a-18a.

The petitioners appealed from the denial of a preliminary injunction, and moved for an injunction against collection of fees pending appeal. The court of appeals (Starr, Williams and Sentelle, JJ.) denied the request for an injunction pending appeal "for the reasons stated by the district court in its well-reasoned explanation in the memoranda and orders issued on October 25, 1988 and November 7, 1988." Order of Dec. 14, 1988.

Acting *sua sponte* the court of appeals set the petitioners' appeal for disposition without oral argument pursuant to D.C. Circuit Rule 13(i). Order of June 22, 1989.[2] On July 13, 1989, the court of appeals (Mikva, Edwards and Ruth B. Ginsburg, JJ.) ordered that "the

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[1] CWA filed its summary judgment motion on November 22, 1988, but the district court has stayed consideration of that motion while the petitioners pursue limited discovery.

[2] D.C. Circuit Rule 13(i)(2) provides: "Except upon a stipulation to dispense with oral argument, a case may be decided without oral argument only if a three-judge panel of this Court unanimously concludes that: (A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) facts and legal arguments are adequately presented in the briefs, pleadings, and record, and oral argument would not significantly aid the Court."

district court's orders, filed October 25, 1988 and November 7, 1988, be affirmed for the reasons stated in the memoranda accompanying those orders." Pet. App. 2a.

ARGUMENT

The *certiorari* petition seeks review of an interlocutory decision of the courts below denying a preliminary injunction. Such review is requested while the merits of the petitioners' statutory claims are *sub judice* on a summary judgment motion filed at the district court's direction. There is nothing in the *certiorari* petition to indicate that this Court should take the extraordinary step of reviewing this matter in piecemeal fashion by taking jurisdiction at this preliminary stage before the courts below have ruled on all of the claims presented.

Far from being an abuse of discretion, the denial of a preliminary injunction by the courts below was based on two independent grounds, each firmly established by this Court's precedents. First, the courts below determined that a preliminary injunction against the collection of agency fees would be contrary to federal labor policy as explicated by this Court's decisions on this very issue. Second, the courts below found that the petitioners had failed to show any substantial danger of irreparable harm, and thus had not established the necessary predicate for the issuance of a preliminary injunction.

1. In the district court, the petitioners "move[d] for a preliminary injunction enjoining the defendant [CWA] from demanding or collecting 'agency fees' through agreements entered with employers under color of the National Labor Relations Act." Mem. of Pts. & Auth. in Supp. of Motion for a Prel. Inj. 1, *Abrams v. Communications Workers*, D.D.C. No. 87-2816 (RCL), docket nr. 15 (Sept. 29, 1988). The petitioners argued that they were "entitled to a preliminary injunction enjoining CWA from 'exacting' 'demanding' or 'collecting' dues-equivalent (or any other) agency fees from them until CWA meets

its burdens of proof under [*Communications Workers v.*] *Beck*[, —— U.S. ——, 108 S.Ct. 2641 (1988),] and [*Chicago Teachers Union v.*] *Hudson*[, 475 U.S. 292 (1986)]." *Id.* at 12.

The district court determined that such an injunction would be contrary to "the federal labor policy against injunctions as recognized in *Machinists v. Street*, 367 U.S. 740 (1961), and *Railway Clerks v. Allen*, 373 U.S. 113 (1963)." Pet. App. 12a.

Applying the teachings of *Machinists v. Street*, *supra*, the *Allen* Court made two rulings that are fatal to the petitioners' demand for a preliminary injunction against CWA's collection of agency fees. First, *Allen* holds that "an injunction relieving dissenting employees of all obligation to pay the moneys due under an agreement authorized by [the federal labor acts] [i]s impermissible." 373 U.S. at 119. Second, *Allen* also holds that "dissenting employees (at least in the absence of special circumstances not shown here) can be entitled to no relief until final judgment in their favor is entered." *Id.* at 120.

While *Street* and *Allen* arose under the Railway Labor Act ("RLA") and the instant cases arise under the National Labor Relations Act ("NLRA"), the union security authorizations in both statutes are "in all material respects identical in language and structure." *Communications Workers v. Beck*, *supra*, 108 S.Ct. at 2648. Moreover, the anti-injunction policy of the Norris-LaGuardia Act applies equally to cases arising under both labor statutes.

It is perhaps most to the point that the petitioners do not even discuss the anti-injunction rulings in *Street* and *Allen*, much less show that the courts below erred in following those rulings.[3]

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[3] While ignoring *Street* and *Allen*, the petitioners rely on two cases approving *final injunctions against racial discrimination*: *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192 (1944), and

2. The courts below concluded that the petitioners were not entitled to a preliminary injunction on a second, wholly independent ground: that the petitioners had failed to demonstrate any substantial danger of irreparable harm. The plaintiffs' claim is that, despite CWA's adjustment of their agency fees through its internal objection procedures, the Union is still charging them too much. As the district court noted, "Plaintiffs' claim thus becomes simply one for money damages, and it is well-recognized that money damages are rarely, if ever, irreparable." Pet. App. 11a. *See also id.* at 17a n. 1.

"The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). The petitioners allege a temporary deprivation of a very small percentage of their income. And, as the courts below recognized, "[i]t seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." *Sampson v. Murray*, 415 U.S. 61, 90 (1974).[4]

Graham v. Broth. of Locomotive Firemen, 338 U.S. 232 (1949). Pet. 15-16. Both of these cases were decided before *Street*, and as *Street* explains, raise very different policy concerns from those entailed in suits challenging the collection of union dues and fees. *Machinists v. Street*, *supra*, 367 U.S. at 772-773. *See* Pet. App. 16a.

[4] Relying upon *United States v. San Francisco*, 310 U.S. 16 (1940), the petitioners assert that, because they have alleged a statutory violation, the only relevant inquiry in determining whether to issue a preliminary injunction is their likelihood of success on the merits. Pet. 18-19. That case holds only that a court may enter a *final injunction* against statutory violations without "a balancing of equities. . . ." 310 U.S. at 18. This Court has consistently held that in the preliminary injunction context, even where a statutory violation is found, "an injunction is an equitable remedy that does not issue as of course." *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987).

The petitioners' claim that their alleged monetary loss is different, because it involves a constitutional violation, is doubly wrong.

First, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the plaintiffs established state action (by showing that their employer was the state), *id.* at 226, and a constitutional violation (by showing that the state law had been construed to allow the expenditure of fees collected from objecting public employees on political activities), *id.* at 215. Nevertheless, this Court held that the state "court was *correct in denying the broad injunctive relief requested.*" *Id.* at 241 (emphasis added).

Second, as the opinions below also demonstrate—and as is made even clearer by the extended analysis in *Kolinske v. Lubbers*, 712 F.2d 471, 474-480 (D.C.Cir. 1983), on which the opinions below rest—under this Court's recent state action decisions, the proposition that the First Amendment would apply to a private collective bargaining agreement is untenable. "[T]his Court has held that a government can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the government." *San Francisco Arts and Athletics v. United States Olympic Committee*, 483 U.S. 522, 546 (1987) (citations and internal brackets and quotation marks omitted). Since, as the courts below noted, "there was no direct governmental involvement in either the parties' adoption of or their continued adherence to the agency shop clause," there is no basis for finding state action in the administration of that contract clause. Pet. App. 9a (internal quotation marks omitted).[5]

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[5] The petitioners rely on *Abood v. Detroit Board of Education, supra*—a public sector case—and on *Ellis v. Railway Clerks*, 466 U.S. 435 (1984)—a case arising under the RLA—to establish state action in agreements covered by the NLRA. Pet. 10-11. However,

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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to the extent that *Abood* even mentions the NLRA, the opinion strongly suggests that agreements negotiated under that statute are *not* subject to constitutional constraints. 431 U.S. at 271 n.10 & 226 n.23. And RLA cases, such as *Ellis*, shed no light on the state action issue under the NLRA, for the simple reason that state action was found in the RLA cases because of that statute's preemption of state union security laws and the NLRA has no such preemptive effect. *Communications Workers v. Beck, supra*, 108 S.Ct. at 2656-57. *See also* Pet. App. 4a-9a, 13a-15a.

We recognize that in *Communications Workers v. Beck, supra*, the Court left this issue open for another day. But for the reasons we noted at the outset this case, in its current posture, does not present an appropriate vehicle for reaching the question. While the interlocutory decisions of the courts below dismissed the petitioners' constitutional claim, their statutory claim is still pending in the district court. It would be contrary to this Court's considered practice to take up the constitutional issue in isolation from the statutory issue. *See DeBartolo Construction Corp. v. Florida Gulf Coast Building and Construction Trades*, —— U.S. ——, 108 S.Ct. 1392, 1397 (1988). And, as the petitioners have failed to show any abuse of discretion in the lower courts' denial of a preliminary injunction, there is no necessity to deviate from that practice here.